

Yvonne Vallette

06/14/2000 01:52 PM

To: robert.e.rose@usace.army.mil, kirchner.bill@epa.gov, Lee
Danecker/R10/USEPA/US@EPA, Steve Roy/R10/USEPA/US@EPA,
Deborah Hilsman/R10/USEPA/US@EPA, John
Olson/R10/USEPA/US@EPA, Ralph Rogers/R10/USEPA/US@EPA,
Mark Jen/R10/USEPA/US@EPA, Richard
Clark/R10/USEPA/US@EPA

cc:

Subject: agricultural exemption question

Hey Guys: I have some thoughts on this one, but wanted to run it through a group think before I came up with a CWA response to the state on this situation. Basically, I take the same position as the state that the 404(f) exemption for a permit for the discharge of fill material into waters of the U.S. for a serviceable structure maintenance does not allow them to obtain the material from one location in order to maintain the serviceable structure at another location. This has the potential to trigger the recapture provision if the proposed discharge is "incidental to" or "part of" an activity that either impairs the flow or circulation of the waters. Gravel removal could constitute an impairment to flow or circulation of the stream. Any one have any thoughts on this issue or advice??? I need to get an answer back to the state soon.

----- Forwarded by Yvonne Vallette/R10/USEPA/US on 06/14/2000 01:16 PM -----



**Earle.Johnson@dsl.st
ate.or.us**

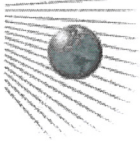
06/14/2000 10:22 AM

To: Yvonne Vallette/R10/USEPA/US@EPA
cc: William.Cook@doj.state.or.us
Subject: agricultural exemption question

We have a criminal case going against Bridgeview Winery in Jackson Co. where the violator altered/removed 180 cubic yards of gravel from a salmon stream (an E-stream) and used the material for maintaining a road and drainfield on EFU zoned land. OSP cited him saying it was a violation of the Removal-Fill Law. His attorney is claiming the work is covered under the Removal-Fill Law exemption allowing "maintenance of farm roads in such a manner as to not significantly adversely affect wetlands." and if not there in the subsequent exemption allowing "maintenance or reconstruction of structures such as dikes, dams, levees, ..." The language is largely cribbed from Clean Water Act 404 exemptions. Our contention is that the exemption applies only where the road, dike, or other structure crosses a wetland or waterway and doesn't give the operator free rein to get the maintenance material from another jurisdictional water located off-site.

Our attorneys are asking whether there is any federal interpretation of these laws that would support our case, or vice versa I suppose. Assuming the alteration activity in the creek went beyond the removal allowance allowed by Tulloch, would EPA find this work to be a violation of the Clean Water Act, given the similar, yet not exact, language in the federal act?

Feel free to answer this yourself or send this around if you're not sure of the answer. Our legal folks have a bit of a time frame problem, so the sooner we could get an answer, the better. Thanks for your help.



Yvonne Vallette

06/20/2003 01:36 PM

To: Teena.G.Monical@usace.army.mil, Dominic.P.Yballe@usace.army.mil,
robert.e.rose@usace.army.mil

cc: Deborah Hilsman/R10/USEPA/US@EPA, Chuck.Wheeler@noaa.gov,
Jim.Houseman@noaa.gov

Subject: Heads up on an application for a NWP 13 on bank erosion

Teena and Dominic: Wanted to give the both of you a heads up on a 404 application that maybe coming in from a Robert Edward Kerivan, owner of Bridgview Vineyards near Cave Junction, Josephine County. Mr. Kerivan is currently under an administrative order issued by EPA for unauthorized activities that he conducted in November 2002 that block the active channel of Sucker Creek and his creation of a new channel by excavation through a gravel bar. This site on Sucker Creek is located just near the confluence of Sucker Creek with the Illinois River. Sucker Creek is designated as critical habitat for Southern Oregon/Northern California coho salmon. EPA's order requires Mr. Kerivan to remove the channel blocking berm. However, Mr. Kerivan is concerned about additional erosion occurring along the bank once that active channel is reopened. EPA is encouraging Mr. Kerivan to apply for a NWP 13 to construct small barbs that will provide some protection from future bank erosion. Because of concerns to salmonids that utilize the area, we are trying to synchronize the barb construction with the berm removal activities. Because of the importance of that area to spawning coho, we hope that these activities can be done during the inwater work period this year.

EPA has been working with Chuck Wheeler and Jim Houseman at the Roseberg Office of NOAA Fisheries on this case. They have been providing us with technical assistance in resolution of this case. Chuck is likely to be the biologist to review the application and determine any consultation needs. We are hoping that Mr. Kerivan's application and proposal will follow the limitations and conditions outlined in SLOPES and allow for a timely issuance. EPA would also like to be involved with the review of the application to insure that it's not contrary to the restoration work that we have requested from Mr. Kerivan.

If you need any more information from EPA about this violation or the circumstances of this permit application, please don't hesitate to contact me.

Yvonne Vallette
Aquatic Ecologist
USEPA, Region 10 - Oregon Operations Office
811 SW 6th Avenue, 3rd Floor
Portland, OR 97204
Phone: 503-326-2716
Fax: 503-326-3399
Email: vallette.yvonne@epa.gov



"Monical, Teena G
NWP"
<Teena.G.Monical@nw
p01.usace.army.mil>

06/20/2003 03:31 PM

To: Yvonne Vallette/R10/USEPA/US@EPA, "Monical, Teena G NWP"
<Teena.G.Monical@nwp01.usace.army.mil>, "Yballe, Dominic P
NWP" <Dominic.P.Yballe@nwp01.usace.army.mil>, "Rose, Robert E
NWP" <Robert.E.Rose@nwp01.usace.army.mil>
cc: Deborah Hilsman/R10/USEPA/US@EPA, "Chuck.Wheeler@noaa.gov"
<Chuck.Wheeler@noaa.gov>, "Jim.Houseman@noaa.gov"
<Jim.Houseman@noaa.gov>

Subject: RE: Heads up on an application for a NWP 13 on bank erosion

Thanks for letting us know Yvonne.

-----Original Message-----

From: Vallette.Yvonne@epamail.epa.gov
[mailto:Vallette.Yvonne@epamail.epa.gov]
Sent: Friday, June 20, 2003 1:37 PM
To: Monical, Teena G; Yballe, Dominic P; Rose, Robert E
Cc: Hilsman.Deborah@epamail.epa.gov; Chuck.Wheeler@noaa.gov;
Jim.Houseman@noaa.gov
Subject: Heads up on an application for a NWP 13 on bank erosion

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If you need any more information from EPA about this violation or the circumstances of this permit application, please don't hesitate to contact me.

Yvonne Vallette
Aquatic Ecologist
USEPA, Region 10 - Oregon Operations Office
811 SW 6th Avenue, 3rd Floor
Portland, OR 97204
Phone: 503-326-2716

Fax: 503-326-3399

Email: vallette.yvonne@epa.gov

Deborah Hilsman

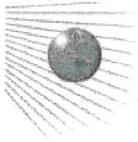
06/25/2003 10:44 AM

To: niel.moeller@noaa.gov

cc:

Subject: Heads up on an application for a NWP 13 on bank erosion

----- Forwarded by Deborah Hilsman/R10/USEPA/US on 06/25/2003 10:44 AM -----



Yvonne Vallette

06/20/2003 01:36 PM

To: Teena.G.Monical@usace.army.mil, Dominic.P.Yballe@usace.army.mil,
robert.e.rose@usace.army.mil

cc: Deborah Hilsman/R10/USEPA/US@EPA, Chuck.Wheeler@noaa.gov,
Jim.Houseman@noaa.gov

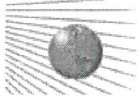
Subject: Heads up on an application for a NWP 13 on bank erosion

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Aquatic Ecologist
USEPA, Region 10 - Oregon Operations Office
811 SW 6th Avenue, 3rd Floor
Portland, OR 97204
Phone: 503-326-2716
Fax: 503-326-3399
Email: vallette.yvonne@epa.gov



Yvonne Vallette

01/21/2004 12:23 PM

To: "Yballe, Dominic P NWP" <Dominic.P.Yballe@nwp01.usace.army.mil>
cc: Deborah Hilsman/R10/USEPA/US@EPA
Subject: Re: Bridgeview Winery

Dominic: No progress has been made on this. What held things up was the letter that Kerivan's attorney sent to you guys (the COE) hoping for a different answer on why Mr. Kerivan's actions didn't qualify as an exemption. EPA was all set to sent Mr. Kerivan a letter back in October telling them that since they didn't get their act together to get the NWP authorization during the 2003 inwater work period, that any damage resulting from high flows were at their own risk and that the current channel blocking structure was still considered to be an unauthorized structure and no maintenance would be allowed. We held off sending out that letter until your folks had a chance to respond to their letter about the exemptions.

They finally got their response in December which reiterated what EPA has been telling them all along that his project was not an exempted activity, so we are now planning to redraft our letter that reminds Mr. Kerivan that his structure is still considered to be an unauthorized structure and that EPA plans to revisit this issue in March to determine what steps are necessary to comply with our 2003 Order. EPA does not plan to do a formal consultation (rather EPA may elect to do a voluntary consultation with the Services if necessary for the restoration activities prescribed in our Administrative Orders, to provide the violator ESA coverage during the implementation of restoration activities) for the bank protection work. The basic ideal was to have Mr. Kerivan get 404 authorization for the bank protection components (and the plan was to have consultation for the bank work covered by the programmatic opinion in SLOPES with the issuance of a NWP, but then Mr. Kerivan didn't want to change his design to allow it to fit under SLOPES II) and have that constructed at the same time as we had him pull out the channel blocking structure. Since Mr. Kerivan did not get the NWP coverage to protect that bank last fall, we thought is best to just wait and see how the creek responded over the winter the current structure and then determine what's necessary this next season to deal with his bank issue and still get that channel unblocked (provided if the creek didn't remove it by itself this winter).

Deborah Hilsman (the EPA attorney I'm working with) and I hope to have a redraft of our October letter finished by the beginning of next week. We'll be sure that you receive a copy of that when we send it out to Mr. Kerivan. I plan to make a site visit in March and see how things look and then work with you and NOAA Fisheries to see what steps we need to take next. If by chance high flows from this winter have taken out the structure, then we don't need to mess with all of this. EPA would just proceed with an administrative penalty to try and close out this enforcement action. Mr. Kerivan would be on his own in trying to get 404 authorization (either through an IP or a NWP) for any kind of bank stabilization project to deal with his eroding bank.

Yvonne M. Vallette
Aquatic Ecologist
U.S. EPA - Region 10
Oregon Operations Office
811 SW 6th Ave., 3rd Floor
Portland, OR 97204
Phone: 503-326-2716
Fax: 503-326-3399
email: vallette.yvonne@epa.gov
"Yballe, Dominic P NWP" <Dominic.P.Yballe@nwp01.usace.army.mil>



"Yballe, Dominic P
NWP"
<Dominic.P.Yballe@nw
p01.usace.army.mil>

To: Yvonne Vallette/R10/USEPA/US@EPA
cc:
Subject: Bridgeview Winery



01/21/2004 11:40 AM

Yvonne,

I was wondering if EPA was initiating formal consultation on the Kerivan's bank protection project. Has there been any progress in this case? Thanks!

Dom

Dominic Yballe

USACE Regulatory Branch
1600 Executive Parkway; Suite 210
Eugene, Oregon 97401
Fax: (541) 465-6888
Office: (541) 465-6894
dominic.p.yballe@nwp01.usace.army.mil



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, PORTLAND DISTRICT
EUGENE FIELD OFFICE
1600 EXECUTIVE PARKWAY, SUITE 210
EUGENE, OREGON 97401-2156

RECEIVED

SEP 08 2003

OREGON OPERATIONS OFFICE
EPA-REGION 10

REPLY TO
ATTENTION OF:

September 5, 2003

Operations Division
Regulatory Branch
Corps No. 200300629

RECEIVED
SEP 10 2003

Mr. Robert Kerivan
Bridgeview Vineyards Winery
4210 Holland Loop Road
Cave Junction, Oregon 97523

OFFICE OF REGIONAL COUNSEL
EPA - REGION X

Dear Mr. Kerivan:

The Corps of Engineers (Corps) has received your preconstruction notification for the construction of four rock barbs and removal of 30 feet from an existing structure on the south bank of Sucker Creek. The site is in Section 36, Township 39 South, Range 8 West; and near the town of Cave Junction, Josephine County, Oregon.

We have considered your position that the work is exempt from Clean Water Act regulation, but find the discharge of dredge or fill material for the construction of the barbs is not an exempted activity. A Department of the Army permit is required for the proposed work.

The work however, would qualify for authorization under Nationwide Permit (NWP) No. 13. NWP 13 authorizes some fills for the purpose of bank protection provided you comply with all the relevant terms and conditions to which this authorization is subject.

Sucker Creek supports runs of Southern Oregon Northern California coho salmon, a species protected under the Endangered Species Act (ESA), and essential fish habitat for salmon as designated under the Magnuson-Stevens Act. NWP General Condition 11 specifies that applicants may not begin work under any NWP authorization until notified by the Corps District Engineer that the requirements of the ESA has been satisfied, and the activity has been authorized.

Certain barb designs are covered by a programmatic ESA consultation between the Corps and National Marine Fisheries Service (NOAA Fisheries). The biological opinion (BiOp) issued by NOAA Fisheries on July 8, 2003, contains the terms and condition to which work covered by this consultation is subject. A design consistent with those covered by the BiOp would greatly expedite the review of your project. We have discussed this project with

NOAA Fisheries, and they have indicated the following changes would need to be made for the project to be covered by the BiOp:

(1) No part of the barb or flow-redirection structure may exceed bank full elevation, including all rock buried in the bank key.

(2) Build the flow-redirection structure (barb) primarily of wood or otherwise incorporate large wood at a suitable elevation in an exposed portion of the structure or the bank key. Placing the large woody debris near streambanks in the depositional area between flow-redirection structures (barb) to satisfy this requirement is not approved, unless those areas are likely to be greater than one meter in depth, sufficient for salmon rearing habitats.

(3) Fill the trench excavated for the bank key above bankfull elevation with soil and topped with native vegetation.

(4) The maximum flow-redirection structure length will not exceed one-fourth of the bankfull channel width.

(5) Place rock individually without end dumping.

(6) If two or more flow-redirection structures are built in a series, place the flow-redirection structure farthest upstream within 150 feet or 2.5 bankfull channel widths, from the flow-redirection structure farthest downstream.

(7) Include woody riparian planting as a project component.

(8) Reduce the barb width to minimum necessary to accomplish project goals.

For your convenience, we have also enclosed an excerpt from the BiOp to assist you (Enclosure). Examples of suitable designs and techniques may be accessed from the Washington Department of Fish and Wildlife habitat technical assistance web page at <http://www.wa.gov/wdfw/hab/ahg/ispgdoc.htm>.

We will also need a plan-view drawing on an 8-1/2 by 11 inch sheet of paper or a size we can reduce to 8-1/2 by 11 inch on our copier. The blue-line drawing provided in the application is too large for us to reduce.

Once the requested information is provided, we will continue to process and evaluate your application. If you have any questions regarding your application, please contact Mr. Dominic Yballe at the letterhead address, telephone (541) 465-6894, or email at dominic.p.yballe@nwp01.usace.army.mil.

Sincerely,

Lawrence C. Evans
Chief, Regulatory Branch

Enclosures

Copies Furnished:

US Environmental Protection Agency (Vallette)
NOAA Fisheries
Black Helterline LLP (TenBrook)

**U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 10
OREGON OPERATIONS OFFICE
811 SW 6TH AVE, 3RD FLOOR
PORTLAND, OREGON 97204**

TO: Deborah Hilsman **DATE:** September 7, 2004

FAX: 206-553-0163 **PHONE:**

#PAGES: 4

REMARKS: Latest correspondence from Corp on Kerivan bank protection application. Seems that was another email concerning this situation on Sept. 5th 2003 that I didn't have in my files that the Corp had in theirs that needs to be included w/ the response to Eric Tenbrook..

From: Yvonne Vallette
Oregon Wetland Coordinator

Phone: 503-326-2716 **Fax:** 503-326-3399

Email: vallette.yvonne@epa.gov





DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, PORTLAND DISTRICT
EUGENE FIELD OFFICE
1600 EXECUTIVE PARKWAY, SUITE 210
EUGENE, OREGON 97401-2156

REPLY TO
ATTENTION OF:

September 1, 2004

Vallette
RECEIVED

SEP 07 2004

OREGON OPERATIONS OFFICE
BPA-REGION 16

Operations Division
Regulatory Branch
Corps No. 200300629

Mr. Clarence Greenwood
Black-Helterline LLP
1900 Fox Tower
805 Southwest Broadway
Portland, Oregon 97205-3359

Dear Mr. Greenwood:

This letter concerns the status of Mr. Robert Kerivan's application to build a series of five barbs in Sucker Creek to control erosion along the bankline. The project is located in Section 36, Township 39 South, Range 8 West; and near the town of Cave Junction, Josephine County Oregon.

In a letter dated September 5, 2003, the U.S. Army Corps of Engineers (Corps) advised Mr. Kerivan of the following:

- a. The discharge of dredge or fill material for the construction of the barbs is not considered an exempt activity, and a Department of Army permit is required for the proposed work.
- b. The project as designed does not comply with the programmatic biological opinion dated July 8, 2003, issued by the National Marine Fisheries Service (NOAA Fisheries) to the Corps, entitled "Revised Standard Local Operating Procedures for Certain Regulatory and Operations Activities Carried Out by the Department of Army in Oregon and the North Shore of the Columbia River." The programmatic biological opinion is herein referred to as Standard Local Operating Procedures for Endangered Species II (SLOPES). The letter detailed specifics on how the project may be changed in order to comply with the "Terms and Conditions" and "Reasonable and Prudent Measures" contained within SLOPES II.
- c. The letter requested reproducible plan-view drawings on 8-1/2 by 11-inch paper. The drawings provided to the Corps were too large to duplicate and the blue-line drawings were not reproducible.

-2-

In a letter dated December 15, 2003, the Corps advised with specificity why the project was not considered exempt and that the proposed project would require individual consultation with NOAA Fisheries in order to satisfy the requirements of the Endangered Species Act. This letter also reiterated the need for reproducible drawings.

Regarding the status of Corps file #200300629, Mr. Kerivan's application is not considered complete. The Corps is unable to initiate consultation with NOAA Fisheries until a complete application is received. Once we receive reproducible drawings on 8-1/2 by 11-inch sized paper, we will continue to evaluate the project and initiate formal consultation with NOAA Fisheries for impacts to Southern Oregon Northern California coho salmon.

At the request of Mr. Eric Tenbrook of your office, we are enclosing a copy of an email we received on September 4, 2003, from the Environmental Protection Agency (Enclosure 1). The email outlines NOAA's position on the barbs, which we independently confirmed in a telephone conversation with Mr. Chuck Wheeler of NOAA Fisheries. If you have any questions or require additional information, please contact Mr. Dominic Yballe at the letterhead address, telephone at (541) 465-6894, or email dominic.p.yballe@nwp01.usace.army.mil.

Sincerely,

Lawrence C. Evans
Chief Regulatory Branch

Enclosure

Copies Furnished:

US Environmental Protection Agency (Vallette)
NOAA Fisheries (Wheeler)
Black Helterline, LLP (Tenbrook)
Applicant (Kerivan)

Yballe, Dominic P NWP

From: Vallette.Yvonne@epamail.epa.gov
Sent: Thursday, September 04, 2003 5:41 PM
To: Hllsman.Deborah@epamail.epa.gov; ejt@bhlaw.com
Cc: chuck.wheeler@noaa.gov; Jim.Houseman@noaa.gov; Monical, Teena G; Yballe, Dominic P; Rose, Robert E
Subject: Adjustments to the Kerivan streambank protection proposal

Deborah/Eric: Here is a summary of what we discussed yesterday of what adjustments would need to be made to Mr. Kerivan's streambank protection proposal that was prepared by the Galli Group, in order to fit the activities under NOAA Fisheries programmatic consultation with the Corp that could potentially allow authorization to occur this year.

Under the Programmatic Biological Opinion and Magnuson-Stevens Act Essential Fish Habitat Consultation for Standard Operating Procedures for Endangered Species (SLOPES II) for Certain Regulatory and Operations Activities Carried out by the Department of Army in Oregon and the North Shore of the Columbia River (issued on July 8, 2003), the conservation measures for streambank protection actions are:

- Woody riparian planting will be included
- No part of the barb structures may exceed bank full elevation, including all rock buried in the bank key
- The barbs will incorporate large wood (the wood will be intact, hard and undecayed to partially decayed with untrimmed root wads to provide functional refugia habitat for fish).
- Maximum barb length will not exceed 1/4 of the bankfull channel width

In addition to these conditions, specific recommendations made by Chuck Wheeler, NOAA Fisheries biologist, was to:

- Adjust the position of the new barbs (which are currently proposed at a 90 degree angle perpendicular to the stream bank) such that they are pointed in a upstream position.
- Scale down the proposed barbs such that they are about 1/2 of the size that is currently proposed. The bottom width of the barbs should be no wider than 6 feet.
- The current barb (barb #1, or what we call the channel blocking structure) will be to be reconstructed such that it conforms to the specifications of the other proposed barbs. In addition it also need to be directed in an upstream direction (it's currently placed in a downstream position).
- There should be a planting plan provided to revegetate any areas in which there will be disturbed soils. There needs to be woody riparian planting included along the side of the creek that is being protected for increased erosion resistance and bank roughness to disrupt stream energy.
- There is enough large woody material that has accumulated along that section of the bank that can be incorporated into the barb construction to met the condition for incorporating large wood into the barb.

If these changes cannot be accommodate, then it is likely that an individual consultation may have to take place before the Corp can issue approval under NWP 13 to authorize the construction of the new streambank protection structures. With the end of the inwater work period coming up on September 15, it is unlikely that an individual

consultation could be completed this year to allow that approval to happen.

So our only other choice would be to allow the current channel blocking structure to stay in place through another high water season rather than risk pulling out the structure without the additional protection and risk additional erosion and sediment to occur in Sucker Creek. But it needs to be reminded that since this structure is unauthorized, maintenance activities would not be allowed should high water or other events cause the structure to fail or become damaged. All risks for the stability of this structure and resulting erosion would be have to be assumed by Mr. Kerivan until authorization can be give by the Corp to rework the structure into a functional stream barb.

So we will wait to hear back from either Mr. Kerivan or his attorney, Eric TenBrook to decide what our next course of action.

Yvonne M. Vallette
Aquatic Ecologist
U.S. EPA - Region 10
Oregon Operations Office
811 SW 6th Ave., 3rd Floor
Portland, OR 97204
Phone: 503-326-2716
Fax: 503-326-3399
email: vallette.yvonne@epa.gov

TRANSACTION REPORT

P. 01

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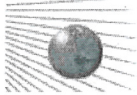
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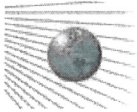


Yvonne Vallette

09/08/2004 05:22 PM


To: Deborah Hillsman/R10/USEPA/US@EPA
cc:
Subject: Re: Bridgeview

----- Forwarded by Yvonne Vallette/R10/USEPA/US on 09/08/2004 05:21 PM -----



Yvonne Vallette

05/24/2004 01:38 PM

To: "Yballe, Dominic P NWP" <Dominic.P.Yballe@nwp01.usace.army.mil>
cc:
Subject: Re: Bridgeview 

Dominic: EPA is currently revising their original administrative order to Mr. Kerivan. In that revised order, we are requesting that only the larger riprap that is still in place and blocking the channel be removed. So basically, EPA is uncoupling our request for removal from Mr. Kerivan's need to construct additional barbs for additional protection. NOAA and EPA believe that it would now be best to have Mr. Kerivan pursue a permit for additional barbs, on his own. He can elect to modify his proposal to fit the terms of SLOPES and get authorization under a NWP, or he can pursue his intended design and seek authorization for an individual permit that would require the necessary consultation. Since that would be an action separate from our enforcement activities, the lead for Section 7 consultation would have to be the COE, just like any other permitting action.

EPA consultation (and we consult differently on enforcement actions as we consider them to be 'voluntary' consultations as our enforcement actions are not subject to ESA) with NOAA will only be done for the removal activities, not the barb construction. Once the removal actions are completed, EPA will be assessing a proposed penalty. NOAA Fisheries is still contemplating an enforcement action on their own for 'take' of designated critical habitat.

You will be getting a copy of the revised administrative order (which I hope is out next week).

Yvonne M. Vallette
Aquatic Ecologist
U.S. EPA - Region 10
Oregon Operations Office
811 SW 6th Ave., 3rd Floor
Portland, OR 97204
Phone: 503-326-2716
Fax: 503-326-3399
email: vallette.yvonne@epa.gov

"Yballe, Dominic P NWP" <Dominic.P.Yballe@nwp01.usace.army.mil>



**"Yballe, Dominic P
NWP"**
<Dominic.P.Yballe@nw
p01.usace.army.mil>

05/21/2004 11:45 AM

To: Yvonne Vallette/R10/USEPA/US@EPA
cc:

Subject: Bridgeview

Hi Yvonne,

Just wondering if you could give me an update on the Bridgeview project. Last I heard, EPA was going to focus on the unauthorized activities and associated penalties. I was

wondering if the applicant came to the Corps with a permit for the additional barbs, would EPA or NOAA Fisheries would be the lead in ESA consultation? Thanks!

Dom

Dominic Yballe

USACE Regulatory Branch
1600 Executive Parkway, Suite 210
Eugene, Oregon 97401
Fax: (541) 465-6888
Office: (541) 465-6894

dominic.p.yballe@nwp01.usace.army.mil